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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1374 90

PEOPLE OF THE STATE OF ILLINOIS, EX REL. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, CHAMPAIGN COUNTY, ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

JOHN L. FRANKLIN,
A. R. PETERSON,
OWEN RALL,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

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No. 1374

PEOPLE OF THE STATE OF ILLINOIS, EX REL. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, CHAMPAIGN COUNTY, ILLINOIS,

AND

ELMER C. BASH AND ALICE J. BASH, AND WANDA I. BASH, A MINOR, BY ELMER C. BASH, HER FATHER AND NEXT FRIEND,

Appellees.

STATEMENT OPPOSING JURISDICTION WITH MOTION TO DISMISS

MAY IT PLEASE THE COURT:

In opposition to the jurisdictional statement of Appellant, the Appellee, Board of Education of School Dis-

rict No. 71, Champaign County, Illinois, respectfully represents:

I

The Judgment of the Supreme Court of Illinois Does Not Draw in Question "The Validity of a Statute of Any State" Within the Meaning of Section 237(a) of the Judicial Code.

Section 237(a) of the Judicial Code, 28 U. S. Code, Sec. 344, gives this Court jurisdiction of an appeal from the highest court of a State in a case "where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Neither the complaint nor the evidence in this case disclose any attack upon any statute enacted by the General Assembly of the State of Illinois. The Appellant has taken this appeal on the theory that the *action* of the Appellee, Board of Education, constitutes "a statute of any State". It is impossible to cull from the record in this case any "statute" or any order, regulation or resolution equivalent to a statute. Neither the complaint nor the evidence contain any resolution, order or regulation of the Board of Education which is claimed to violate constitutional rights of the Appellant. In Appellant's jurisdictional statement a reference is made to minutes of a meeting of the school board (Printed Abstract of Record, p. 164). The record at this point does not contain the minutes. Neither do these minutes appear in any other portion of the record and what these minutes contain is wholly undisclosed by this record.

A careful examination of the complaint (Abstract, pp. 1-44) fails to disclose any regulation, order or resolution of the school board which is claimed to be invalid. In fact,

the gravamen of the complaint is not that invalid regulations have been adopted but that (Abstract, p. 21) "the defendant has ever refused and failed, and yet does refuse and fail, to adopt or enforce any rule or regulation prohibiting instruction in religious education in said public schools". This is followed by the prayer that the Court issue a writ of mandamus to the Board of Education "ordering it to immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education" etc. (Abstract, p. 21).

This Court held in *King Manufacturing Co.* v. *Augusta*, 277 U. S. 100 (1928) that a city ordinance was a "state statute" within the meaning of Section 237(a) of the Judicial Code. Mr. Justice Brandeis, with whom Mr. Justice Holmes concurred, dissented at length on the ground that when the Act of February 13, 1925 (28 U. S. Code, Sec. 344) struck from Section 237 of the Judicial Code the words "or an authority exercised under any state", the amendment deprived this Court of jurisdiction (on the then writ of error) of cases involving the validity of city ordinances.

In *Hamilton* v. *Board of Regents of University of California*, 293 U. S. 245 (1934) this Court entertained an appeal challenging the constitutional validity of a formal "order" of the regents of the University of California requiring able-bodied students to take military training during their freshman and sophomore years. The Court said (p. 258):

> "The meaning of 'statute of any state' is not limited to acts of state legislatures. It is used to include every act legislative in character to which the State gives sanction, no distinction being made between acts of the state legislature and other exertions of the state lawmaking power".

In support of this statement the Court cited *King Manufacturing Co.* v. *Augusta*, 277 U. S. 100 (1928) and *Sultan*

R. & Timber Co. v. *Department of Labor & Industries*, 277 U. S. 135 (1928). (The *Sultan* case was described by the Court in the *Sultan* opinion as one "brought to restrain the enforcement of an order, legislative in character, made by a state bureau"). In the *Hamilton* opinion this Court then concluded (p. 258):

> "It follows that the order making military instruction compulsory is a statute of the State within the meaning of Section 237 a."

No act of the Board of Education, either legislative in character or otherwise, is set up or challenged in this case. The challenge is rather directed against the result of failure to legislate.

In the recent case of *Wilson* v. *Cook*, 327 U. S. 474 (1946) this Court held that the mere objection to an exercise of authority (the levying of a tax) under a statute, whose validity is not attacked, cannot be made the basis of an appeal. Even more clearly in our case, the attack on the *result* of the inaction of the Board of Education is not an attack on any statute.

By no stretching of language can the actions or inactions of the Board of Education complained of in this case be considered "a statute of any state". The relator's grievance was that the Board of Education had refused to enact regulations, not that it had "legislated" in a manner not in harmony with the Federal Constitution. We suggest that this Court has never construed Section 237 of the Judicial Code to extend to complaints of inaction on the part of a State and that such an extension would be even less reasonable in view of the 1925 amendment to Section 237 of the Judicial Code eliminating the words "or an authority exercised under any state". We further suggest that entertaining this appeal will break down the limitations sought to be placed by the 1925 amendment on appeals to

this Court allowable as a matter of right. A holding that the permissive use such as we have in this case constitutes a statute would permit the obligatory review on appeal of almost any act or inaction of a quasi-legislative body. Neither the language nor the logic of any previous case in this Court sustains the argument that the action or lack of action of the Board of Education—whether or not embodied in a resolution, the text of which is not shown in the record—is "a state statute".

Motion to Dismiss

WHEREFORE the Appellee, Board of Education of School District No. 71, Champaign County, Illinois, now comes and moves this Court to dismiss the appeal of the Appellant, People of the State of Illinois ex rel. Vashti McCollum, for the reason that there was not in this case "drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

II

Treating the Appeal Papers as a Petition for Certiorari, the Writ Should Be Denied

A writ of certiorari should be denied here because (1) there is no substantial Federal question presented and (2) the judgment below is clearly correct on all questions arising under the Federal Constitution which were presented to and decided by the Supreme Court of Illinois.

The religious education classes of which relator, Vashti McCollum, complains are conducted by teachers employed by the Champaign Council on Religious Education (Abstract, pp. 153, 165) and without any expense to the school district (Abstract, pp. 164-165, 202, 210, 306). The classes

are entirely voluntary and are attended only by pupils whose parents authorize it in writing and designate the class to be attended (Abstract, pp. 152, 168). Additional groups, even atheists, are to be freely permitted to participate in the program on the same terms (Abstract, pp. 152, 154, 205). Lesson materials and curriculum are selected by a committee to avoid any offensive, doctrinal, dogmatic or sectarian teaching (Abstract, pp. 202, 203, 206, 209). The teaching to the Protestant group is of the content of the Bible without interpretation or attempt at influencing belief in the doctrines or creeds of any church (Abstract, pp. 136-137, 138, 184, 201, 205-206, 208, 291). The Jewish teaching, with only Jewish children present during the years that that group held classes, was in accordance with the Jewish beliefs (Abstract, p. 294). The Catholic teaching, with only Catholics present, is in conformity with the Catholic faith (Abstract, p. 195).

Upon requestion of the parents, pupils are released from their public school work to attend these classes in religious education, a plan approved in *People ex rel. Latimer* v. *Board of Education*, 394 Ill. 228, 68 N. E. 2d 305 (1946). That case approved and followed a similar holding in *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195, 156 N. E. 663 (1927). The difference between the situation in the *Latimer* case, involving the Chicago schools, and the present case is that in the *Latimer* case the pupils went to nearby churches for instruction. Because of the distance of church buildings from the Champaign schools (Abstract, p. 204) and the hazard from traffic to which the children would be exposed, the classes are held in school rooms which are not otherwise in use (Abstract, pp. 204, 310).

The unanimous opinion of the Illinois Supreme Court carefully lists the constitutional objections urged before it by the Appellant (396 Ill. 14, 18-19, 71 N. E. 2d 161, 163).

No objection was made in that Court under the First or Fourteenth amendments to the use of public school property. Hence the question is not presented by this case, whether the use of school rooms for religious education classes is an aid to religion prohibited by either or both of those amendments. Compare *Everson* v. *Board of Education*, decided February 10, 1947, October Term 1946, No. 52.

The attack on the use of public property was based solely upon Section 3 of Article VIII of the Illinois Constitution which provides:

> "Neither the general assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the state or any such public corporation, to any church, or for any sectarian purpose."

Both the three judges of the trial court and the Supreme Court of Illinois were unanimous in finding as a matter of fact that no public expense was incurred because of the religious education classes and that the wear on the furniture was negligible and would be disregarded under the doctrine, *de minimus non curat lex* (396 Ill. 14, 24-25, 71 N. E. 2d 161, 166).

The specific inhibition in the Illinois constitution against any appropriation or payment of public funds in aid of a church or sectarian purpose is as stringent as any restriction that can be spelled out of the First and Fourteenth Amendments. However, the court below was not called

upon to determine whether the merely incidental use of school property is absolutely prohibited by the establishment-of-religion clause of the First Amendment. That point was not made in that court. Therefore, the court below considered the use of school buildings only in connection with the charge made before it that such use violated the Illinois constitution. While the decision on the Illinois constitution is persuasive that the permissive use of school premises involved here does not violate the First and Fourteenth Amendments, that was not the question before the Court.

Whether the court below properly interpreted its own state constitution is not a Federal question but is a question of local law and is, therefore, not a ground for granting of certiorari.

Porter v. *Investors Syndicate*, 287 U. S. 346, 347 (1932);
Des Moines Nat. Bank v. *Fairweather*, 263 U. S. 103, 105 (1923).

The constitutional questions under the Federal Constitution which may be urged in this Court are limited to those presented to and decided by the court below. Thus, in *Wilson* v. *Cook*, 327 U. S. 474 (1946), this Court, quoting *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 317, stated (p. 362):

> "In reviewing the judgment of a state court, this Court will not pass upon any Federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented."

The claim that the use of school premises is in some manner a violation of the First and Fourteenth amendments was not presented to the court below and hence need not be

discussed here. The Appellant did contend that the existence of religious education classes was a deprivation of religious liberty of her son, James Terry McCollum, because, Appellant argued, there was pressure to enroll in the the classes so that enrollment was not voluntary and because there was social discrimination against those who did not join. In this aspect of the case she did contend that these voluntary classes were an infringement of the First and Fourteenth Amendments and also of Section 3 of Article II of the Illinois constitution which provides:

> "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions; * * *. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship."

The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

Section I of the Fourteenth Amendment provides in part:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

We submit that no substantial Federal question is presented on this branch of the case.

The charge and the evidence of the supposed embarrassment to the Appellant's son cannot be understood without

referring to the fact that Appellant and her son are avowed atheists (Abstract, pp. 237-238, 267). Appellant's son testified that he had told his "cub scout" friends about his atheism and was teased about it, but he was not teased about not taking religious education (Abstract, pp. 237-240).

The Supreme Court of Illinois held (396 Ill. 14, 22, 71 N. E. 2d 161):

> "In the instant case, the religious education classes are voluntary and are not part of the public-school program, and pupils are excused from their public-school classes while attending the classes in religious education."

It also held that no stigma was attached to the Appellant's son because he did not take religious education. The trial judges had made the same finding (Abstract 84, 86-88) and the evidence supports such holding (Abstract, pp. 175, 239-240, 312, 313, 320, 327, 333-334, 336, 337, 338, 340).

There is no evidence whatever that the voluntary system does "classify" or "segregate" children into religious and non-religious groups. One student in five in the grade schools and four students out of five in the junior high schools did not take religious education (Abstract, p. 330). Numerous students who did not take religious education testified that they did not feel the slightest embarrassment at not participating or feel the slightest coercion to participate. Those who do not participate are motivated by many reasons. Many such students are church members. Some do not attend because they get all the knowledge of religion they wish from other sources. Some are too interested in, or behind in, their school subjects to spare the time. One, Appellant's son, is an atheist and his mother desires to avoid exposing him to the religious education classes because of her atheism. Thus, boys and girls who do not enroll

in the classes fall into a conglomerate mass. Failure to participate stamps no one an atheist, discloses no religious scrupples, assigns no reason. The classes are not compulsory, subject to a student's being excused, but are wholly voluntary in each instance, admission thereto being limited to those making written application.

The unsoundness of Appellant's position in contending that the mere presence of these voluntary classes is a violation of her son's religious liberty, which she says arises from the fact that religious differences are pointed out and segregation, ostracism and embarrassment result, is demonstrated by the ridiculous conclusions to which the line of argument leads: No flag salute may be permitted in a public school because those asking to be excused from participating will expose their religious views. No cafeteria may be operated in a public school because in refusing pork, or in refusing all meat on certain days, students may disclose religious beliefs. The national anthem and "America" and "God Bless America" may not be sung for they recognize a Deity and an atheist refusing to join in singing may perchance thereby expose his irreligious views.

In *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943) this Court held that school children could not be compelled against their will to salute the American flag and recite an oath of allegiance to the Nation. Opposing counsel would now extend the holding of that case so as to prohibit the flag salute altogether in order not to expose religious differences. Such an argument carries the claim to religious freedom to an absurd length, and in the present instance collides with the religious liberty of parents and students who approve the classes in religious education.

Since the classes in religious education are entirely optional, they do not violate religious freedom: *Hamilton* v.

Board of Regents of University of California, 293 U. S. 245 (1934).

The voluntary plan which is involved in this case, fostered by persons outside of the public school system and without expense to the public, so clearly does not violate the religious liberty of the Appellant secured to her by the First and Fourteenth Amendments that no substantial Federal question is involved and certiorari should be denied.

Respectfully submitted,

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